IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.335 OF 2006
IN
WRIT PETITION NO. 1852 OF 1997

NRC Limited and another ....Applicant/ Petitioner

versus

The State of Maharashtra & anr... Respondents.

Shri S.G.Aney Sr. advocate with Shri Rajesh L.Shethia
for the applicants.
Shri A.P.Vanarse AGP for Respondent no.1.
Shri A.S.Rao for Respondent no.2.

CORAM; V.G.PALSHIKAR &
D.B.BHOSALE, JJ.

DATED; 2006.

JUDGMENT :(Per Palshikar, J.)

1. By this application, the applicant seeks review/recall of the order dated 17-11-2005 passed in Writ Petition No.1852 of 1997.

2. By the above petition, the petitioner had challenged the demand of Rs. 1.21 crores as octroi on the import of wood pulp and slaked lime on various grounds. According to the petitioner, the demand was illegal. The petition was admitted in the year 1997 and came up for hearing in the year 2005. During all these years, the interim order worked against the municipality.

3. On 17-11-2005 when the matter came up for hearing, none appeared for the petitioners though they were enjoining the interim relief for last more than seven years. The reply affidavit filed by the Corporation was perused. The contentions raised by the petitioners were perused. In the affidavit-in-reply in para 2, it was contended that the petitioner has alternate efficacious remedy under section 406 of B.P.M.C.Act 1949. Therefore reserving that remedy to the petitioner, the petition was dismissed.

4. This order is sought to be reviewed or recalled for reasons mentioned in the application. The petitioner is a company ably advised by lawyers, yet there was delay of 48 days in filing this review petition. It is sought to be condoned though no adequate reasons are stated in the application nor anywhere canvassed. However taking into consideration the fact that the order was passed in the absence of the advocate of the petitioner and the delay of 48 days, in the interest of justice, was condoned. We have taken up the application for hearing on merit.

5. Mr. Aney the learned Senior advocate appearing on behalf ofthe petitioner submitted that relying on several decisions of the Supreme Court of India, that

the rule of following alternate remedy is a rule of prudence and not a hard and vast rules. According to him, circumstances can exist in which interference is possible or necessary. Relying on a judgment of the Division Bench of this Court reported in **1992 Mh.L.J. page 1212,** it was contended that taking into consideration the pendency of the petition for last seven years, it would be improper to drive the parties to a fresh bout of litigation on the ground that remedy of appeal under section 406 was not exhausted. In this very judgment, however, it has been found by the Division Bench that where there are disputed facts which requires adjudication of the disputes by cogent evidence, parties can be forced to go for the alternate efficacious remedy. In the present case the claim of the petitioner is that wood pulp imported by them is not covered by the category as alleged by the municipality. It would be necessary in the circumstances, for the petitioner to prove by cogent evidence that the category of the imported goods are not covered by any of the defined category. In view of such existing dispute on facts, it would be proper on our part, requiring the parties to take up alternate remedy.

6. Reliance was also placed on several decisions of the Supreme Court of India for the contention of

existence of alternate remedy, resulting in the petition under Article 226 of the Constitution. There are several judgments of the Supreme Court from the category in which interference is possible can be culled out. However the proposition of law that where there are serious disputed facts, writ jurisdiction cannot be invited and should not be exercised is undisputable. However all the decisions on which reliance was placed by Shri Aney were rendered prior to 1999.

7. In the year 1999 the Supreme Court had occasion to consider this aspect of resorting to alternate remedy and in the judgment reported in **AIR 1999 S.C. page 1786** it is observed by the Supreme Court of India as under:

> *"The Constitutional Court should insist upon the party to avail of the same instead of invoking the extra ordinary writ jurisdiction of the Court."*

The Supreme Court then observed that the High Court may exercise the jurisdiction under Article 226 if it notices any special circumstances, which requiring the High Court to deviate from the settled proposition of law regarding exercise of writ jurisdiction under

Article 226. In our opinion, no such special circumstances exist in this case. The dispute over the exact entry under which octroi can be levied or excise can be charged is the general evidence which is required for its adjudication and there is nothing therefore, in the circumstances of this case, which would require us to exercise the jurisdiction for stating the circumstances for doing so.

8. The Supreme Court has then observed the manner of the High Court and cautioned the High Court Judge more careful in exercise of writ jurisdiction under Article 226. Observations of the Supreme Court of which verbatim notes are as follows:

> *"The High Court appears to have adopted a very generous, general and casual approach in applying the right to livelihood to the facts and circumstances of the case apparently for the purpose of clothing itself with the power and jurisdiction under Article 226 of the Constitution. We are sure that if the High Court had considered the argument in the right perspective and in the light of various pronouncements of this Court, it would not have ventured to assume jurisdiction for the purposes of conferring the State largess of*

public money, upon an unscrupulous litigant who preferred his claim on his proclaimed assumption of being as important as the Government of the State and equal thereto."

9. It was keeping in mind the above observations of the Supreme Court of India that we insisted on the petitioner, pursuing the alternate remedy. True it is, a period of seven years and more is passed. No injury is caused because the interim order is operating in his favour. In such circumstances, in our opinion there is no reason whatsoever to recall or review our order dated 17-11-2005.

10. In the result, therefore, the review petition fails and it is dismissed.

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